

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA 08-181

TERESA HOLBROOK

APPELLANT

V.

MARGARET FREEMAN

APPELLEE

Opinion Delivered October 8, 2008

APPEAL FROM THE POPE COUNTY
CIRCUIT COURT, [NO. PR-2007-56]

HONORABLE GORDON W. "MACK"
MCCAIN JR., JUDGE

AFFIRMED

EUGENE HUNT, Judge

This case requires us to construe a trust agreement and decide whether one of the two settlors of a revocable trust can amend the trust after the death of the other settlor. Appellant Teresa Holbrook appeals the circuit court's dismissal of her complaint, which it based on its finding that appellee did have the authority to amend the trust. On appeal, she makes the following arguments: (1) the trial court erred because the clear wording of the Freeman Family Trust provides that only both settlors, not the surviving settlor, can amend the trust after the first settlor's death; (2) even if the court finds that the trust can be amended by the surviving settlor, she can only amend as to property she contributed to the trust after the other settlor's death. We agree with the trial court's ruling, and thus we affirm.

In her complaint, appellant sought (1) a temporary restraining order preventing appellee as trustee from distributing trust assets for purposes other than those set forth in

the trust agreement; (2) an accounting by appellee of all trust property from the date of J.T. Freeman's death to the present; (3) restoration of trust property if the court found trust property had been distributed for purposes other than those set forth in the trust agreement; (4) removal of appellee as trustee if the court found trust property had been distributed for purposes other than those set forth in the trust agreement; and (5) an award of attorney fees. Appellee filed a combined answer and motion to dismiss for failure to state facts upon which relief could be granted under Arkansas Rule of Civil Procedure 12(b)(6). The trial court ruled in appellee's favor, and the complaint was dismissed. This appeal followed.

The trust agreement known as the "Freeman Family Trust" was executed on February 20, 1992, by J.T. Freeman and Margaret Freeman. The Freeman Family Trust (or the "trust") was created as a revocable trust, with J.T. and Margaret Freeman, husband and wife, as the settlors and Betty Cowan, their daughter, as the trustee. The portions of the trust relevant for this appeal are as follows:

4. Revocability. Settlor specifically reserve the right and power to alter, delete, modify, change and/or revoke any paragraph of this Trust Agreement and all provisions thereof at any time; provided, however, that this right is personal to Settlor and may not be exercised by a personal representative.

....

7. Dispositive Provisions. The principal and income of this Trust shall be devoted to the providing of the support, maintenance, care and comfort of Settlor for and during their natural life. To this end, the Trustee shall pay over and distribute to Settlor, on no less than a monthly basis, any and all income from this trust. Additionally, the Trustee is specifically authorized to pay any person, firm, or corporation catering to or providing to Settlor for her care, maintenance, support and comfort, to the end that they shall be maintained, cared and provided for in a

manner becoming to their station in life and the means of the trust estate to provide therefor.

8. Upon the death of both Settlers, the Trustee shall be authorized to pay from the Trust all debts owed by Settlers, including the expenses of their last illness and funeral, as well as taxes, both State and Federal, if any. Upon the death of the surviving Settlor, this Trust shall terminate, and after having paid the expenses of their respective last illnesses and funerals, and upon termination, the remaining assets of the Trust, if the same are still in existence, shall be distributed as follows: The remaining assets of the trust, whether real or personal, shall be sold and the proceeds from such sale shall be divided and distributed in equal shares unto our daughters, Brenda McCurrie, Betty Cowan, Shirley Bridges, and Teresa Holbrook.

The Freeman Family Trust was amended on September 4, 1998, to remove Brenda McCurrie from sharing in the distribution of the assets of the trust after the death of the settlors. On June 16, 2005, the settlors removed Betty Cowan as trustee and appointed themselves as trustees in her place. J.T. Freeman died on August 9, 2005. On September 8, 2005, Margaret Freeman revoked Paragraph 8 of the trust agreement, which set out the termination of the trust and the distribution of the trust assets. In its place, appellee provided for distribution as follows: \$20,000 to Brenda McCurrie; the remainder, "whatever that sum may be," to be divided equally among the other three daughters, Betty Cowan, Shirley Freeman, and appellant. These sums were to be payable at a rate of \$600.00 per month.

Appellee remarried after J.T. Freeman's death. According to appellant's complaint, appellee has told her, Betty Cowan, and Shirley Freeman that she (appellee) has taken trust property and placed it in the name of herself and her present husband.

Appellant also alleges that appellee has taken trust property and spent it for purposes other than those set forth in the trust agreement.

The trial court explained its ruling in a letter to counsel dated August 30, 2007. First, it found to be significant the fact that the settlors chose not to create an irrevocable trust, place specific restrictions on the surviving settlor in the event of death, or create separate trusts in either settlor with specific property dedicated to each. The court stated that if the Freemans' intention had been to restrict the actions of a surviving spouse, such restrictions could have been made a part of the trust document. The court did not accept appellant's argument that Section 4 of the Trust Agreement, entitled "Revocability," restricted the surviving spouse from modifying the trust document. The court found that based on the context, the language designating that the "right is personal to the Settlor" was meant to restrict a personal representative from exercising that right, not a surviving spouse.

First, appellant contends that the trial court's order dismissing her complaint for failure to state a claim upon which relief can be granted is clearly erroneous because the clear wording of the Freeman Family Trust provides that only both settlors, not the surviving settlor, can amend the trust after the first settlor's death. Appellant contends that the trust can be amended or revoked only by *both settlors* because the plural of "settlor" is used. We disagree.

In cases where the appellant claims that the trial court erred in granting a motion to dismiss, appellate courts review the trial court's ruling using a de novo standard of

review. *Floyd v. Koenig*, 101 Ark. App. 230, ___ S.W.3d ___ (2008) (citing *Nucor Corp. v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004)). Additionally, we will not reverse a probate judge's findings of fact unless they are clearly erroneous. *Conner v. Donahoo*, 85 Ark. App. 43, 45-46, 145 S.W.3d 395, 396 (2004).

The cardinal rule in construing a trust instrument is that the intention of the settlor must be ascertained, and the settlor's intention will govern. *Bailey v. Delta Trust & Bank*, 359 Ark. 424, 432, 198 S.W.3d 506, 512-13 (2004). This intention is to be determined from viewing the four corners of the instrument, considering the language used, and giving meaning to all of its provisions, whenever possible. *Id.*, 198 S.W.3d at 513. This court will construe the words and sentences used in a will or trust in their ordinary sense in order to arrive at the testator or settlor's true intention. *Id.* In order to determine the intentions of the testator or settlor, consideration must be given to every part of the instrument. *Id.*

At issue is the appellee's power to modify or revoke the Freeman Family Trust. Paragraph 4 of the trust specifically reserved the power to "alter, delete, modify, change and/or revoke any paragraph" of the trust. Viewing the trust agreement as a whole, we find no limitation on appellee's right to amend or revoke the trust. A trust agreement that sets out by its own terms the method by which it may be revoked can be revoked only in the manner provided. *See Gall v. Union Nat. Bank of Little Rock*, 203 Ark. 1000, 159 S.W.2d 757 (1942). Where, as here, the trust does not specify a particular method by which the trust must be modified or revoked, the power may be exercised by any method

which sufficiently manifests his intention to modify the trust. *See* Ark. Code Ann. § 28-73-602(c)(2)(B) (Supp. 2007); Restatement (Second) of Trusts § 331, cmt. c. Appellee's actions in distributing trust property for purposes other than her support and maintenance effectively amended the trust.

Appellant next makes an alternative argument: that even if the court finds that the Freeman Family Trust can be amended by the surviving settlor, appellee can amend only as to property she contributed to the trust after the other settlor's death. Appellant bases her argument on Ark. Code Ann. section 28-73-602 (Supp. 2007),¹ which provides:

- (b) If a revocable trust is created or funded by more than one (1) settlor:
 - (1) to the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses;
 - (2) to the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution; and
 - (3) upon the revocation or amendment of the trust by fewer than all of the settlors, the trustee shall promptly notify the other settlors of the revocation or amendment.

Appellant contends that to the extent that the property was contributed by J.T. Freeman, appellee cannot revoke or amend the trust.² First, we point out that appellant failed to make this argument below, and therefore the argument is considered waived for purposes of appeal. *See, e.g., Quinney v. Pittman*, 320 Ark. 177, 895 S.W.2d 538 (1995). Furthermore, we reject this argument. J.T. and Margaret Freeman married on August 23, 1953. They executed the Freeman Family Trust on February 20, 1992, after having been

¹ Pursuant to Ark. Code Ann. section 28-73-1106(a), the Arkansas Trust Code is applicable retroactively to trusts created before September 1, 2005.

² Arkansas is not a community property state, and there is no evidence that the Freemans ever resided in a community property state. Therefore, there is no community property at issue in this case.

married for nearly forty years. Since there is no evidence that the property contained in the trust was anything other than marital property, we conclude that the trial court did not clearly err in holding that appellee could amend or revoke the trust without limitation.

Because we find that the appellee had the power to amend or revoke the Freeman Family Trust without limitation, we affirm the trial court's dismissal of appellant's complaint.

Affirmed.

PITTMAN, C.J., and BAKER, J., agree.